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December 1, 2020

VIA ELECTRONIC FILING AND ELECTRONIC MAIL

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 507, 1102, and 1329 of the Public Utility Code for, inter alia, approval of the acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority, Docket No. A-2019-3015173 -- Kimberly-Clark Pennsylvania, LLC and Kimberly-Clark Corporation ("Kimberly-Clark") Main Brief

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Main Brief of Kimberly-Clark Pennsylvania, LLC and Kimberly-Clark Corporation ("Kimberly-Clark") in the above-referenced proceeding.

A copy of this filing is being served on all active parties of record per the enclosed Certificate of Service.

Sincerely,



Michelle Skjoldal

Enclosures

cc: Judge Jones, Judge Brady (via electronic filing and email)
All active parties of record

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, which was filed via the electronic filing system, upon the participants listed below via electronic mail in accordance with the requirements of Section 1.54 (relating to service by a participant):

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Dated: December 1, 2020



Michelle M. Skjoldal

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In Re: Application of Aqua Pennsylvania	:	
Wastewater, Inc. pursuant to Sections 507, 1102,	:	
and 1329 of the Public Utility Code for, inter alia,	:	Docket No. A-2019-3015173
approval of the acquisition of the wastewater	:	
system assets of the Delaware County Regional	:	
Water Quality Control Authority	:	
	:	

**MAIN BRIEF OF
KIMBERLY-CLARK PENNSYLVANIA, LLC AND
KIMBERLY-CLARK CORPORATION**

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Dated: December 1, 2020

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE.....	1
A. Procedural History	2
B. Overview of the Proposed Transaction.....	2
II. BURDEN OF PROOF	2
III. STATEMENT OF QUESTIONS INVOLVED.....	3
IV. SUMMARY OF ARGUMENT	4
V. ARGUMENT	8
A. Section 1329.....	8
1. Introduction.....	8
2. Section 1329 – Legal Principles	8
3. Aqua’s Application	9
4. Challenges to UVE Appraisals	9
5. Conclusion	9
B. Section 1102/1103 Standards – Public Interest	9
1. Section 1102/1103 – Legal Principles	9
2. Fitness	10
3. Affirmative Public Benefits	10
4. Public Interest	12
a. Common Pleas Litigation	12
b. Rate Stabilization Trust.....	12
c. Other	13
5. Environmental Aspects of the Proposed Transaction	17
6. Conclusion – Public Interest and Benefit.....	21
C. Recommended Conditions	22
D. Section 507 Approvals.....	23
1. Legal Principles	23
2. Municipal Protestants’ Contracts.....	23
3. Contracts Other Than Municipal Protestants’ Contracts	23
E. Other Approvals, Certificates, Registrations and Relief, If Any, Under the Code	23
VI. CONCLUSION WITH REQUESTED RELIEF	24

Appendix A: List of Kimberly-Clark’s Sponsored Testimony and Exhibits

Appendix B: PROPOSED FINDINGS OF FACT

Appendix C: PROPOSED CONCLUSIONS OF LAW

Appendix D: PROPOSED ORDERING PARAGRAPHS

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Burleson v. Pa. Pub. Util. Comm’n.</i> , 461 A.2d 1234 (Pa. 1983).....	2
<i>City of York v. Pa. Pub. Util. Comm’n.</i> , 295 A.2d 825 (Pa. 1972).....	10
<i>Consol. Edison Co. of New York v. Nat’l Labor Relations Bd.</i> , 305 U.S. 197 (1938).....	3
<i>Erie Resistor Corp. v. Unemployment Comp. Bd. of Review</i> , 166 A.2d 96 (Pa. Super. 1961).....	3
<i>Lehigh Valley Transp. Services, Inc. v. Pa. Pub. Util. Comm’n.</i> , 56 A.3d 49 (Pa. Commw. Ct. 2012).....	3
<i>McCloskey v. Pa. Pub. Util. Comm’n.</i> , 195 A.3d 1055 (Pa. Commw. Ct. 2018).....	3
<i>Murphy v. Comm. Dept. of Public Welfare, White Haven Center</i> , 480 A.2d 382 (Pa. Commw. Ct. 1984)	3
<i>Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n.</i> , 413 A.2d 1037 (Pa. 1980).....	3
<i>Popowsky v. Pa. Pub. Util. Comm’n.</i> , 937 A.2d 1040 (Pa. 2007)	10
<i>Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n.</i> , 578 A.2d 600 (Pa. Commw. Ct. 1990)	2, 3
<i>Seaboard Tank Lines, Inc. v. Pa. Pub. Util. Comm’n.</i> , 502 A.2d 762 (Pa. Commw. Ct. 1985)	3, 10
STATUTES	
<i>2 Pa. C.S. § 704</i>	3
<i>66 Pa. C.S. § 332(a)</i>	2
<i>66 Pa. C.S. § 1102(a)(3)</i>	9
<i>66 Pa. C.S. § 1103(a)</i>	9, 10
<i>66 Pa. C.S. § 1329</i>	8

I. STATEMENT OF THE CASE

Kimberly-Clark Corporation and Kimberly-Clark Pennsylvania, LLC (“Kimberly-Clark”), by and through the below-signed counsel, submit this Main Brief in support of its Protest to the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua”). Aqua seeks to acquire the wastewater system assets of Delaware County Regional Water Quality Control Authority (“DELCORA”) and the right to provide wastewater services in the areas served by DELCORA.

Kimberly-Clark is DELCORA’s largest industrial customer and, if this transaction is approved, Kimberly-Clark will be Aqua’s largest industrial customer. *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 2, line 1. Kimberly-Clark operates a manufacturing plant in Chester, Pennsylvania that has a substantial and beneficial economic impact in this region. *Id.* at page 1, lines 2-3. As part of its operations at this plant, Kimberly-Clark produces a massive volume of wastewater that is processed by DELCORA. In 1910, Scott Paper Company purchased what was then an abandoned soap factory. *Id.* at page 2, line 15. Kimberly-Clark acquired the plant in 1995. *Id.* at line 16. The plant is 1.1 million square feet and located on a 90 acre site. *Id.* at lines 16-17. Currently, Kimberly-Clark is one of the largest employers in Chester. There are 575 full-time employees who operate the plant 24 hours a day, 7 days a week. *Id.* at lines 17-18. The plant primarily produces Scott® Brand bath tissue. *Id.* at line 18. Additionally, Kimberly-Clark has invested over \$350 million into infrastructure for the plant over the last ten years. *Id.* at lines 19-20.

As explained below, Kimberly-Clark’s main concern is that, over time, the proposed transaction will result in substantial rate increases. In addition, there is a risk that the proposed transaction may jeopardize the environmental permits that allow Kimberly-Clark to send its wastewater to DELCORA’s Western Regional Treatment Plant.

A. Procedural History

Kimberly-Clark has actively participated in this proceeding since filing its Protest on August 21, 2020. Kimberly-Clark participated in the Initial Prehearing Conference on September 2, 2020, and both Public Input Hearings on September 16, 2020. Kimberly-Clark filed Direct Testimony on September 29, 2020, and Surrebuttal Testimony on November 2, 2020. Kimberly-Clark also participated in the Evidentiary Hearings that took place virtually on November 9-10, 2020.

For the full Procedural History, Kimberly-Clark incorporates by reference this section of the Main Brief filed by Sunoco Partners Marketing & Terminals L.P. (“SPMT”) (jointly with Kimberly-Clark the “Industrial Protestants”).

B. Overview of the Proposed Transaction

Kimberly-Clark incorporates by reference this section of SPMT’s Main Brief.

II. BURDEN OF PROOF

As the applicant and the party seeking affirmative relief from the Commission, Aqua bears the burden of proof in this proceeding. *See* 66 Pa. C.S. § 332(a). To satisfy that burden, Aqua must demonstrate by a preponderance of the evidence that the proposed transaction complies with Pennsylvania law. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n.*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990). The Pennsylvania Supreme Court has stated that the party with the burden of proof has a formidable task. Even where a party has established a *prima facie* case, the party with the burden of proof must establish that “the elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.” *Burleson v. Pa. Pub. Util. Comm’n.*, 461 A.2d 1234, 1236 (Pa. 1983). The evidence must be substantial and legally credible, and cannot be mere “suspicion” or a “scintilla” of evidence. *Lansberry*, 578 A.2d at 602.

To obtain a certificate of public convenience, “the acquiring public utility has the burden, by preponderance of the evidence, to establish that it is technically, legally and financially fit to provide the proposed service.” *McCloskey v. Pa. Pub. Util. Comm’n.*, 195 A.3d 1055, 1058 (Pa. Commw. Ct. 2018), *citing Seaboard Tank Lines, Inc. v. Pa. Pub. Util. Comm’n.*, 502 A.2d 762 (Pa. Commw. Ct. 1985). An existing certificate holder is entitled to a continuing presumption regarding its fitness. *McCloskey* 195 A.3d at 1058. Parties challenging the application bear the burden of rebutting this presumption. *Lehigh Valley Transp. Services, Inc. v. Pa. Pub. Util. Comm’n.*, 56 A.3d 49, 58 (Pa. Commw. Ct. 2012).

The Commission’s adjudications must be supported by substantial evidence in the record. *See* 2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 602. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consol. Edison Co. of New York v. Nat’l Labor Relations Bd.*, 305 U.S. 197, 229 (1938). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Commw. Ct. 1984).

III. STATEMENT OF QUESTIONS INVOLVED

There are three key questions presented by this proceeding: (1) Should the Commission approve a transaction in which the increased costs to Kimberly-Clark and other ratepayers and the environmental permitting risks far outweigh any asserted benefits to ratepayers or to the public? (2) If the Commission approves the transaction despite the immense cost it imposes on ratepayers, should the Commission impose conditions to reduce or lessen the harm to ratepayers, including Kimberly-Clark and other large industrial ratepayers? (3) If the Commission approves the transaction despite the substantial environmental permitting risks it creates for

Kimberly-Clark, should the Commission impose conditions in order to lessen the harm or to mitigate the permitting risks?

IV. SUMMARY OF ARGUMENT

For Kimberly-Clark, the proposed transaction is potentially very harmful in two ways. First, Aqua will have substantially higher capital costs than DELCORA. *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 9, lines 14-15. Over time, this will translate into substantially higher revenue requirements and substantially higher rates for the same service.

Second, the rates that DELCORA charges to Kimberly-Clark are governed by a 1973 Service Agreement. *See* Aqua Statement No. 6-R, Rebuttal Testimony of John Pileggi, page 11, lines 17-19. Aqua and DELCORA now claim that this Agreement has been terminated, but they acknowledge that DELCORA's rates are still governed by the economic standards contained in this Agreement. *Id.* Regrettably, however, Aqua has made no commitment to retain the economic standards in this 1973 Agreement. This creates risks and uncertainties for Kimberly-Clark that did not previously exist.

Kimberly-Clark is DELCORA's largest customer in the Western Service Region and appears to be its largest customer overall.¹ As such, Kimberly-Clark is potentially exposed to the greatest economic harm from the future rate increases attributable to this transaction.

¹ According to DELCORA, Kimberly-Clark is the largest volume industrial customer in the Western Service Region. Kimberly-Clark's flow is 30% higher than the next largest western industrial customer. During the calendar year 2019, DELCORA budget documents indicate that the volume of wastewater discharged by Kimberly-Clark was approximately 1,468,438 million gallons and that Kimberly-Clark paid DELCORA \$4,077,441 for its services. Kimberly-Clark's discharge volumes and revenue are approximately 18.7% and 16.2%, respectively, of DELCORA's Western Plant total volumes and revenue. *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 8, lines 8-15.

At this point, it is indisputable that this transaction will lead to substantial rate increases. Today, as a public authority, DELCORA is not beholden to equity investors and is able to borrow capital on advantageous terms. *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 9, lines 8-9. DELCORA is also eligible for various grants and loans that are made available only to public entities. *Id.* at lines 9-10.

By contrast, Aqua is a private sector firm obligated to increase profits for its shareholders. According to Aqua's 2019 Annual Report, Aqua has a history of generating 10% returns. *Id.* at lines 13-14. Unlike DELCORA, which has no shareholders, Aqua must raise equity capital in the market. Aqua is not eligible for all of the same federal and state grants and loans made available to public sector agencies, and Aqua's rate of return would necessarily include a return on equity. As a result, Aqua's overall rate of return and its revenue requirements would be substantially higher than DELCORA's. Furthermore, Aqua will have to gross-up its revenue requirements to account for taxation. This will inevitably have an adverse impact on every DELCORA ratepayer, including Kimberly-Clark. *Id.* at lines 20-21.

Aqua admits that the transaction would result in a 12.55% rate increase. *See* SPMT Statement No. 2, Direct Testimony of Howard Woods, page 6, lines 2-9. SPMT expert Howard Woods testified that the revenue requirement for DELCORA under private sector ownership would effectively double and would increase by \$15 million per year, even before any additional investment. *Id.* at page 6, lines 11-20. If and when Aqua invests another \$1.1 billion, as planned, this difference grows to \$46 million per year. *Id.* at page 7, lines 4-14. In other words, the proposed transaction would eventually require that ratepayers, including Kimberly-Clark, pay an additional \$46 million per year.

There are no off-setting benefits that are material. To be sure, Aqua claims that there are certain economies of scale, without offering concrete evidence. Yet even if the asserted economies of scale are accepted at face value, they are only in the range of \$3.7 million per year. *See Delaware County Hearing Exhibit No. 1 (Aqua's Responses to Delaware County Set X Interrogatories)*. This is tiny in comparison to Aqua's increased revenue requirements.

Aqua claims there will be economies of scale because Aqua is "bigger and better" than DELCORA. However, unlike with Aqua's past acquisitions, DELCORA is already a large entity, and Aqua plans to continue operating the wastewater system in exactly the same way as DELCORA. *See SPMT Statement No. 2, Direct Testimony of Howard Woods, page 15, lines 18-19*. Aqua is keeping all of the DELCORA employees and intends to implement DELCORA's capital investment program, including the planned expansion of the Western Regional Treatment Plant. In addition, the supposed economies of scale are largely undocumented and unproven.

Aqua and DELCORA claim to lessen or defer the inevitable rate increases by creating the Customer Trust Fund, but they have not guaranteed that this Trust will be fully funded. And there are many uncertainties that could reduce the size or duration of this Fund. This Trust should not be given any weight as an alleged benefit of the transaction. To the extent the Trust is funded, it will eventually run out and then customers will be back to bearing the full weight of Aqua's increased capital costs. *See, e.g., Id.* at pages 30-31.

The proposed transaction also creates environmental permitting risks for Kimberly-Clark. *See Kimberly-Clark Statement No. 2, Wentz Direct Testimony, page 2, lines 10-21*. Kimberly-Clark is currently able to discharge its wastewater to DELCORA, and does not need a separate NPDES permits. *Id.* at page 10, lines 1-5. The plant operates under an informal process with DELCORA, and DELCORA is the entity responsible for obtaining all governmental permits.

But if the transaction were to occur, even Aqua admits it will have to obtain new permits. Aqua has been unable to say when those new permits will be acquired and whether industrial customers will be responsible for obtaining any additional permits.

Kimberly-Clark is an important contributor to the community and drives a significant volume of economic activity. Kimberly-Clark has also made substantial investments in local infrastructure. If there is a shutdown because of permitting delays or gaps or because of any permitting issues, it would be catastrophic for Kimberly-Clark and for the community.

In addition, the asserted benefits of the transaction do not come close to outweighing these negatives. While Aqua and DELCORA have identified theoretical benefits, they are all vastly overstated or illusory. For example, Aqua claims certain environmental benefits, like eliminating DELCORA's reliance on the City of Philadelphia Wastewater Plant and expanding the Western Regional Treatment Plant. But DELCORA was planning to take all of those same actions; these steps will be taken whether the transaction is approved or not. The Customer Trust Fund is alleged to be a "benefit," but in reality it is simply an attempt to lower or reduce the harm to ratepayers on a temporary basis and with significant uncertainties.

The disadvantages and costs of the proposed transaction are very tangible, direct, and substantial. By contrast, the supposed advantages or benefits of the proposed transaction are amorphous and insignificant. For these reasons, the Commission should deny the application.

However, if the Commission decides to approve the transaction, it should impose conditions in order to address and mitigate the harms to ratepayers. Aqua should be required to create a Tariff Rider that would allow large industrial customers with competitive options to obtain special contract rates. This Tariff Rider should be made available to industrial ratepayers that have contributed facilities or capital to DELCORA, as Kimberly-Clark has done. Additionally, Aqua

should be required to follow the economic principles in Kimberly-Clark's 1973 Service Agreement at least until the next rate case. The Commission also should require Aqua to complete full cost of service studies for the DELCORA zone prior to the first rate case. Cost of service studies should evaluate whether high volume customers with continuous flow have comparatively lower costs of service. These studies also should consider factors such as wastewater constituents. Lastly, Aqua should be required to keep the industrial customers well-informed on the environmental permitting issues, and the transaction should be conditioned on Aqua successfully obtaining the necessary permits allowing continuous flow of wastewater from large industrial customers. Certainly, Aqua should not be allowed to consummate the transaction until the permitting issues are resolved on a basis that is satisfactory for Aqua and for the large industrial customers.

V. ARGUMENT

A. Section 1329

1. Introduction

Section 1329 was enacted in April 2016 and became effective on June 13, 2016. Act 2016-12 (HB 1326). Section 1329 provides, *inter alia*, that when a regulated private sector water or wastewater utility acquires a municipal water or wastewater provider, the regulated utility can ask for ratemaking treatment of the acquired utility's assets using fair market value. 66 Pa. C.S. § 1329. Importantly, Section 1329 did NOT abrogate or repeal the other sections of the Code. While Section 1329 provides incentives for the acquisition of faltering public systems, it did not eliminate or alter any of the other standards or requirements for approval (*e.g.*, Sections 1102, 1103, and 507). The legal principles for these other standards and requirements are each addressed in turn below.

2. Section 1329 – Legal Principles

Kimberly-Clark takes no position on Section 1329 legal principles.

3. Aqua's Application

Kimberly-Clark takes no position on Aqua's Application as it relates to this section.

4. Challenges to UVE Appraisals

Kimberly-Clark takes no position on challenges to UVE appraisals.

5. Conclusion

Kimberly-Clark adopts and incorporates by reference this section of SPMT's Main Brief.

B. Section 1102/1103 Standards – Public Interest

1. Section 1102/1103 – Legal Principles

Aqua has the burden of proving it satisfies the requirements of the Code, particularly Sections 1102 and 1103. *See* 66 Pa. C.S. §§ 1102 and 1103. Section 1102(a) provides that the Commission must issue a Certificate as a legal prerequisite to a public utility offering service or abandoning service and certain property transfers by public utilities. The Code provides the following, in pertinent part:

Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

(3) For any public utility . . . to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

66 Pa. C.S. § 1102(a)(3).

The Commission will only grant a Certificate “if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” *See* 66 Pa. C.S. § 1103(a). To ensure that

a transaction is in the public interest, the Commission may impose conditions in granting a Certificate that it deems to be just and reasonable. *Id.*

In order for the Commission to approve the proposed transaction under Sections 1102 and 1103 of the Code, the Applicant must demonstrate that the proposed acquisition will “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n.*, 295 A.2d 825, 828 (Pa. 1972). The Pennsylvania Supreme Court explained the *City of York* standard as follows:

[T]he appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission’s finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

Popowsky v. Pa. Pub. Util. Comm’n., 937 A.2d 1040, 1057 (Pa. 2007).

Additionally, pursuant to Section 1103 of the Code, Aqua must show that it is technically, legally, and financially fit to own and operate the assets it seeks to acquire. *Seaboard Tank Lines v. Pa. Pub. Util. Comm’n.*, 502 A. 2d 762, 764 (Pa. Commw. Ct. 1985).

2. Fitness

Kimberly-Clark takes no position on Aqua’s fitness.

3. Affirmative Public Benefits

Aqua has not demonstrated that the increased costs of private-sector ownership resulting from the proposed acquisition will be offset by other benefits to ratepayers or to the public. The evidence of record indicates that Aqua simply plans to step into DELCORA’s shoes and maintain the status quo.

As noted above, Aqua has asserted that the proposed transaction will create economies of scale. Unlike in prior Aqua transactions, however, DELCORA is already a large entity with substantial resources.

Furthermore, when Aqua has been pressed to identify and quantify the proposed economies of scale, it has fallen short. *See* Delaware County Hearing Exhibit No. 1 (*Aqua's Responses to Delaware County Set X Interrogatories*). Specifically, Aqua has identified \$3,718,872 in asserted annual cost savings. *Id.* Yet many of these items are unproven, or are implausible on their face, or do not represent efficiencies of scale. For example, the second largest item is for the "contingency reserve." DELCORA had budgeted a reserve of \$700,000 and Aqua apparently will remove this from the budget. Yet this is not a real cost saving; it is just a less conservative budgeting approach. Similarly, the largest item is for "information technology." DELCORA had budgeted \$773,000; Aqua claims that it is budgeting \$0 for this expense. *Id.* Yet it is impossible to believe that Aqua will have no information technology costs. Insofar as this service is provided by another Aqua affiliate, the costs will almost certainly be passed through as administrative charges or under some other broad classification. It is not a cost savings or an efficiency simply because the billing and payment is implemented internally, within the Aqua corporate family.

More importantly, even if the \$3,718,872 in total costs were a defensible number, this annual cost is far lower than the increased capital costs attributable to the transaction. By one estimate, even before any new investment, Aqua's annual revenue requirement will be \$15 million higher than DELCORA's revenue requirement. *See* SPMT Statement No. 2, Direct Testimony of Howard Woods, page 6, lines 11-20.

Aqua also asserts that there are environmental benefits associated with the shift away from the Philadelphia wastewater plant. As explained previously, however, DELCORA has already made the decision to effectuate this change. Thus the proposed transaction does not yield any additional benefit.

In addition, Kimberly-Clark adopts and incorporates by reference this section of SPMT's Main Brief.

4. Public Interest

a. Common Pleas Litigation

Kimberly-Clark adopts and incorporates by reference this section of SPMT's Main Brief.

b. Rate Stabilization Trust

The burden is on Aqua and DELCORA to establish that the proposed transaction will benefit ratepayers and will serve the public interest. Yet the transaction is structured in a way in which it will substantially increase rates for all consumers in the long run. *See* SPMT Statement No. 2, Direct Testimony of Howard Woods, page 6, lines 2-9. Under the governing statute, the purchase price will be used to substantially increase the rate base. While the Customer Trust Fund may potentially offset or defer any rate increase for a limited period of time, many customers will require service long into the future. In addition, Aqua has not made any binding commitments or guarantees on the size of the Trust Fund, and there may be residual property interests held by various Counties or Townships that could further impact the Trust Fund's size. In addition, as structured by Aqua, there will be no direct oversight of the Trust Fund by the Commission. If there are issues in the future involving the Trust Fund, it is unclear whether, or to what extent, the Commission would have jurisdiction to adjudicate and resolve them.

The Trust Fund could to some degree reduce or defer the economic harm associated with the proposed transaction. However, in view of all the uncertainties relating to its size and duration, the materiality of this benefit cannot be determined and appears to be minimal at best.

In addition, Kimberly-Clark adopts and incorporates by reference this section of SPMT's Main Brief.

c. Other

In assessing the public interest, there is one other point that should be considered. Specifically, DELCORA executed a Service Agreement with Scott Paper Company dated December 1, 1973 ("Service Agreement") under which Scott Paper and several other industrial customers funded the construction and operations of DELCORA's Western Wastewater Treatment Plant ("Western Plant") and a related conveyance system. *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 3, lines 6-9. That conveyance system was constructed and now is used by DELCORA in order to serve several industrial customers, including the Scott Paper plant now owned by Kimberly-Clark. *Id.* at lines 9-11. Under the Service Agreement, Scott Paper was obligated to pay 26% of the annual debt service charges related to the bonds issued to purchase and construct the Western Plant and 55% of the annual debt service charges for the bonds issued for the purchase and construction of the conveyance system. *Id.* at lines 12-15. On December 12, 1995, Kimberly-Clark assumed all of the rights and obligations of Scott Paper under the Service Agreement as part of Kimberly-Clark's acquisition of the plant. *Id.* at lines 15-17. Kimberly-Clark has paid rates and charges to DELCORA in accordance with the Service Agreement since it assumed the Agreement. *Id.* at lines 17-19. Kimberly-Clark has also continued to fund the capital and operating requirements of the Western Plant and the related conveyance system in accordance with the terms of the Service Agreement. *Id.* at lines 19-21. A copy of the Service Agreement is attached to the Application as Exhibit F105.

In recent weeks, DELCORA has claimed that the Service Agreement expired or was terminated in 2003 and that thereafter Kimberly-Clark agreed that the “pretreatment program’s Rules and Regulations” would determine the terms of the relationship. *Id.* at page 4, lines 2-4. Kimberly-Clark was not aware of DELCORA’s claim that the Service Agreement was terminated until this proceeding and apparently both Aqua and DELCORA were unaware of any alleged termination until this proceeding as well. *See* Kimberly-Clark Statement No. 1-SR, Brooks Surrebuttal Testimony, page 1, line 23, page 2, lines 1-2. The Service Agreement was attached to the Application (Exhibit F105) and to the Asset Purchase Agreement (Exhibit B1) as one of the contracts DELCORA must assign to Aqua if the transaction is approved. In the Asset Purchase Agreement dated September 2019, DELCORA and Aqua clearly state that Kimberly-Clark’s Service Agreement will be assigned and assumed. In addition, Kimberly-Clark has found no evidence in its business records to support DELCORA’s assertion that the Service Agreement expired. *Id.* at page 2, lines 7-8. As far as Kimberly-Clark knows, the alleged 2003 termination letter cited by Mr. Packer and DELCORA could have been rescinded. Kimberly-Clark has been unable to identify any fully formed successor agreement and according to Mr. Pileggi, no such written successor agreement exists. *Id.* at lines 10-12; Aqua Statement No. 6-R, Rebuttal Testimony of John Pileggi, page 11, lines 16-17.

More importantly, both DELCORA and Kimberly-Clark have acted as if the Service Agreement is still in effect. For example, the quarterly invoices Kimberly-Clark receives from DELCORA states very clearly that the charges incurred are “per agreement dated December 18, 1973.” *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 4, lines 16-17; *See also* Exhibit Kimberly-Clark TB-2 (copy of quarterly invoice). Mr. Pileggi also admitted that DELCORA continues to calculate Kimberly-Clark’s rates based on the terms in the Service

Agreement and that “DELCORA’s pretreatment program’s Rules and Regulations do not determine billing rates for flow and loadings.” *See* Aqua Statement No. 6-R, Rebuttal Testimony of John Pileggi, page 11, lines 17-19, and page 12, lines 4-6. Thus Mr. Packer’s and DELCORA’s claims that Kimberly-Clark agreed to allow the pretreatment program’s Rules and Regulations to determine the terms of the relationship after the Service Agreement allegedly expired make no sense.

Kimberly-Clark is not asking the Commission to resolve this contractual issue, but the Commission should recognize the importance of the Service Agreement terms that have defined Kimberly-Clark’s relationship with DELCORA. These terms acknowledge Kimberly-Clark’s substantial contributions to DELCORA and Kimberly-Clark’s status as DELCORA’s largest industrial customer. DELCORA agreed to provide Kimberly-Clark with sufficient capacity in the Western Plant:

Section 1.3 DELCORA, further, hereby agrees to provide sufficient capacity in said Western Regional Plant for the treatment of said wastewater during the term hereof.

DELCORA also agreed that Kimberly-Clark will not be responsible for costs unrelated to its own wastewater:

Section 3.2 The User Service Charges established by DELCORA, however, will be uniform for all users in the same category and region as Industry. Such Service Charges will not include any costs of: (1) the collection, conveyance and treatment of wastewater in the Eastern Delaware County Service Area; (2) the cost of any of DELCORA’s collection conveyance, or treatment facilities in the Western Delaware County Service Area not used for Industry’s wastewater hereunder; (3) any debt service costs for expansion of the Western Regional Plant beyond a capacity of 60 MGD, except to the extent that such expansion is required to provide additional capacity or increased degree of treatment for Industry.

DELCORA further agreed to utilize all available grants and subsidies:

Section 7.1 DELCORA will make all applications for available grants and subsidies with respect to the construction and operation of the facilities

owned and operated by It, and used by Industry, and the proceeds thereof will be credited equitable to all users of the system in computing the rates to be charged by DELCORA, subject to applicable State and Federal regulations.

That Kimberly-Clark would not be responsible for applying for permits:

Section 11.1 This Agreement shall be deemed to be the permit that is required for users, under the DELCORA Standards, Rules and Regulations of 1973 and Industry shall be exempt from the applicability of said permit sections thereof.

And that Kimberly-Clark's wastewater would not require a surcharge:

Section 20.5 DELCORA agrees that the existing wastewater of Industry, based on representations made by Industry and subject to applicable federal laws and regulations, is acceptable to DELCORA without the necessity for a surcharge.

Thus, under its 1973 Service Agreement, Kimberly-Clark and Scott Paper paid millions of dollars of DELCORA's capital costs. For thirty years or longer, Kimberly-Clark paid 26 percent of the annual debt service charges for the Western Plant and 55 percent of the annual debt service charges for the conveyance system used to transport wastewater to that Plant. DELCORA is now proposing to sell these assets to Aqua, and effectively, DELCORA is selling off assets that Kimberly-Clark helped to purchase. Yet there is no proposed mechanism for giving a refund to Kimberly-Clark. The proposed Trust Fund could reduce rates temporarily for all customers, not just for those that have borne substantial capital costs.

Nor has Aqua agreed to adopt and follow the economic principles embedded in Kimberly-Clark's 1973 Service Agreement. DELCORA admits that it continues to follow those principles despite its claim that the Agreement was terminated. *See* Aqua Statement No. 6-R, Rebuttal Testimony of John Pileggi, page 11, lines 17-19. Aqua, however, refuses to maintain the status quo.

By exposing a large industrial customer to potential economic harm, Aqua's actions in the end may harm the broader community. Kimberly-Clark is an economic engine in this region and is a large employer. If Kimberly-Clark is harmed, it could have broader ramifications for the community.² In these circumstances, the Commission should at a minimum seek to reduce or mitigate the harm associated with the proposed transaction.

5. Environmental Aspects of the Proposed Transaction

DELCORA's Industrial Pretreatment Program and Permits

Kimberly-Clark currently relies on DELCORA to obtain any and all permits with respect to the wastewater that is transported to the Western Plant. Kimberly-Clark then receives an Industrial Wastewater Discharge Permit through DELCORA's Industrial Pretreatment Program. *See* Kimberly-Clark Statement No. 2, Wentz Direct Testimony, page 10, lines 1-2. DELCORA is responsible for administering the Pretreatment Program and obtaining all necessary federal or state permits, including the National Pollutant Discharge Elimination System (NPDES) permits. *Id.* at 2-5. Throughout this proceeding, Kimberly-Clark has expressed concern that, as a private sector firm, Aqua may no longer be eligible to administer the Industrial Pretreatment Program or obtain NPDES permits that cover the industrial wastewater processed by the Western Plant. *See, e.g., id.* at 17-19. As the owner and operator of a publicly owned treatment works, DELCORA is able to administer the Industrial Pretreatment Program and obtain NPDES permits that cover the wastewater discharges of Kimberly-Clark. *Id.* at page 11, lines 17-19. Aqua has provided no evidence or authority to show that, as a private entity, it will be eligible to do the same.

² There is undisputed evidence that Kimberly-Clark could build its own treatment plant on site. Kimberly-Clark owns and operates its own treatment plants at dozens of other plants and has the expertise to take this approach. Kimberly-Clark will do what is necessary to remain competitive in the long run.

In its discovery responses, Aqua claims that the Pretreatment Program and NPDES permits will be transferred from DELCORA to Aqua through a simple “notice procedure.” *Id.* at 20-22. Yet Kimberly-Clark has been unable to find any rule or regulation to support Aqua’s claim. *Id.* at 22-23. In Aqua’s rebuttal testimony, Mr. Mark Bubel, Sr., a project engineer for Aqua, claims that “upon the finalization of the Proposed Transaction, Aqua plans to operate the pretreatment program as it is currently performed.” *See* Aqua Statement No. 4-R, Bubel Rebuttal Testimony, page 2, lines 19-21. But Aqua and Mr. Bubel simply put forth ideas about what Aqua “expects” to happen or steps Aqua “plans” to take in the future. *See* Kimberly-Clark Statement No. 2-SR, Wentz Surrebuttal Testimony, page 6, lines 2-3. If the transaction is approved, Kimberly-Clark needs certainty regarding its ability to maintain operations and continue discharging wastewater. Any disruption in Kimberly-Clark’s ability to discharge wastewater could be catastrophic. Kimberly-Clark suggests that if Aqua is confident it can administer the Industrial Pretreatment Program and obtain all necessary permits, then the Commission should impose conditions that bar consummation of the transaction until the permit issues are resolved on a satisfactory basis. Aqua should not be allowed to complete the transaction unless it secures the necessary permit changes.

The Beneficial Nature of Kimberly-Clark’s Wastewater

Kimberly-Clark’s view is that Aqua should create a Tariff Rider that allows for the development of special contracts with large industrial customers that have competitive alternatives. Any such Tariff Rider should allow Aqua to retain customers that pay their variable costs of service and make a contribution to the utility’s fixed costs. Additionally, any such Rider should allow Aqua to take into account the volume and characteristics of the wastewater produced by particular customers, such as Kimberly-Clark.

According to DELCORA, Kimberly-Clark is the largest volume industrial customer in the Western Service Region. Kimberly-Clark sends about 4 million gallons of wastewater per day to DELCORA's Western Plant. *See* Kimberly-Clark Statement No. 2, Wentz Direct Testimony, page 5, line 4. All of this wastewater receives treatment at DELCORA's Western Plant. *Id.* at line 15. During the calendar year 2019, DELCORA budget documents indicate that the volume of wastewater discharged by Kimberly-Clark was approximately 1,468,438 million gallons, and Kimberly-Clark paid DELCORA \$4,077,441 for its services. *Id.* at lines 8-10.

The key constituents of the wastewater from Kimberly-Clark's two outfalls are paper fibers and soil. *Id.* at page 6, lines 3-4. Other chemicals in the wastewater are for water treatment or come from treated city water. *Id.* at lines 4-5. The paper fibers are essentially the same fibers found in any publicly available toilet paper used by consumers. *Id.* at lines 5-7. The levels of TSS and BOD are within permit limits and are less than any discharge where human excrement is a part of that discharge. *Id.* at lines 7-8. DELCORA has eliminated or scaled back the amount of sampling Kimberly-Clark is required to conduct over the last few years because there have been no concerns or issues with sampling for constituents that are not present in the wastewater, including heavy metals, TSS, and BOD. *Id.* at lines 8-12. This is mostly clean city water that greatly dilutes the fiber content of Kimberly-Clark's wastewater and is believed to be beneficial to the treatment process used at DELCORA's Western Plant. *Id.* at lines 12-14.

In order for a wastewater treatment plant to run effectively, it needs a good population of microorganisms that perform the essential work of digesting the material that the wastewater treatment plant receives. *Id.* at lines 17-19. Since Kimberly-Clark's paper is virgin pulp and its water is either disinfected river water or city water and does not contain human

excrement, leachate, oils, or harmful chemicals, the microorganisms can digest it easily and they essentially have a good diet on which to thrive. *Id.* at lines 19-22. Those microorganisms are necessary to DELCORA's operations and are always there to consume the TSS in the wastewater. *Id.* at lines 22-23, page 7, line 1. Kimberly-Clark's wastewater is the perfect food to keep this population of microorganisms healthy and eliminates the need for DELCORA to purchase supplemental "food." *Id.* at lines 1-3. The TSS of paper solids is an easily digestible food and is easily managed by the microorganisms. *Id.* at lines 3-4.

Kimberly-Clark's wastewater also does not contain any additional constituents that are not already found in households that flush toilet paper except, importantly, Kimberly-Clark's is free from human excrement. *Id.* at lines 4-6. The volume of Kimberly-Clark's water also allows for greater dilution of other wastewater DELCORA receives that is highly concentrated. *Id.* at lines 6-8. For example, DELCORA may receive landfill leachate or wastewater from industries that send low flow but high concentrations of solids and other materials. *Id.* at lines 8-10.

In addition to high volume, Kimberly-Clark's wastewater also has a high load factor, which means the flow of wastewater is continuous and does not exhibit large fluctuations hour-to-hour or day-to-day. *See* Kimberly-Clark Statement No. 2-SR, Wentz Surrebuttal Testimony, page 3, lines 10-12. The Chester plant operates 24 hours a day, 7 days a week. *Id.* at line 13. This constant flow makes Kimberly-Clark's wastewater easier and cheaper to process as compared to wastewater from customers with low load factors. *Id.* at lines 13-15.

Any claims to the contrary made by DELCORA or Aqua are incorrect. *See, e.g., id.* at page 3, lines 17-23, page 4, lines 1-22. Furthermore, any attempts to compare Kimberly-Clark's wastewater to wastewater from municipalities, individual homeowners, and/or small commercial customers, or attempts to imply Kimberly-Clark's wastewater is somehow more

harmful than these users, are completely misplaced. *Id.* at page 5, lines 1-5. Wastewater from residential sources and municipalities contains a wide range of harmful substances including excrement, blood, vomit, food items, paint, paint thinner, pesticides, used oil, and pharmaceuticals. *Id.* at lines 5-7. People flush all types of products down their toilets. *Id.* at lines 7-8. Pharmaceuticals are also present in human waste because they are excreted. *Id.* at lines 8-9. This is in addition to the multitude of bacteria and viruses found in excrement. *Id.* at line 9. And to the extent that the DELCORA system captures municipal storm water, that water contains pesticides, herbicides, used oil, garbage, yard trimmings, leaves, dead animals, and a host of other substances found on the streets. *Id.* at lines 10-12. None of these harmful substances are found in Kimberly-Clark's wastewater, which contains paper fibers and mud from the Delaware river. *Id.* at lines 12-14. As such, Kimberly-Clark's wastewater should be much easier and cheaper to process as compared to wastewater from municipalities, individual homeowners, and small commercial customers. *Id.* at lines 14-16.

If Aqua is required to undertake the cost of service studies in advance of its first rate case, it should be required to evaluate the extent to which wastewater constituents may drive costs in serving particular industrial customers. Likewise, any such cost of service studies should evaluate whether, or to what extent, continuous flow (a low peak to average flow ratio) may drive down the costs of service. This cost information may be especially useful if and when Aqua establishes a Tariff Rider allowing the creation of special rate agreements.

6. Conclusion – Public Interest and Benefit

The main effect of the proposed transaction would be to privatize this existing entity, thereby greatly increasing its revenue requirements. Ratepayers would be forced to pay more for the same service and for the same assets and facilities. There are no proven benefits for ratepayers or for the public.

Nor has Aqua established that this transaction is necessary or in the public interest. The evidence indicates that DELCORA is a large public authority that is able to operate its wastewater system effectively and is able to raise capital when needed on reasonable terms. *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 7, lines 5-6.

C. Recommended Conditions

Kimberly-Clark is asking the Commission to deny the Application on the grounds that the transaction has no proven benefits to the public or to DELCORA's current customers. Should the Commission grant the Application, Kimberly-Clark is asking the Commission to mitigate the harm that will result by imposing appropriate conditions. As a first condition, Aqua should establish a Tariff Rider for the purpose of allowing contract rates for industrial customers such as Kimberly-Clark. Contract rates seem especially appropriate for customers that have made substantial financial contributions in the past, that have competitive alternatives, and that have the ability to cease using the utility in the future, if needed.

As a second condition Aqua should be required to follow the ratemaking principles in the 1973 Service Agreement until Aqua's first rate case is completed. Kimberly-Clark should also receive the benefits of the Customer Trust Fund for as long as that Fund exists.

As a third condition, the Commission should prohibit consummation of the proposed transaction until the environmental permitting issues are resolved on a basis that is acceptable to the large industrial customers and to Aqua. Aqua should not be allowed to consummate if consummation will undermine the ability of these industrial firms to continue their operations without interruption.

As a fourth condition, Aqua should be required to maintain a separate DELCORA rate zone. DELCORA's customers should not be called upon to subsidize any of Aqua's other customers elsewhere on Aqua's system.

As a fifth condition, Aqua should be required to complete cost of service studies prior to its first rate case. These studies should determine Aqua's costs for the DELCORA zone and should separate out the Eastern and Western Regions. These studies should also evaluate whether, or to what extent, wastewater characteristics and peak to average flow ratios may affect Aqua's costs in serving particular industrial customers. These cost of service studies should be made publicly available at least sixty (60) days prior to the initiation of any rate case by Aqua. This will allow interested parties to review the data as needed.

D. Section 507 Approvals

1. Legal Principles

Kimberly-Clark takes no position on Section 507 legal principles.

2. Municipal Protestants' Contracts

Kimberly-Clark takes no position on the Municipal Protestants' contracts.

3. Contracts Other Than Municipal Protestants' Contracts

Kimberly-Clark takes no position on contracts other than the Municipal Protestants' contracts.

E. Other Approvals, Certificates, Registrations and Relief, If Any, Under the Code

Kimberly-Clark takes no position on the issue of whether other approvals, certificates, or registrations are required under the Code.

VI. CONCLUSION WITH REQUESTED RELIEF

The Commission should either deny the application or should impose conditions as outlined above.

Respectfully submitted,

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Dated: December 1, 2020

KIMBERLY-CLARK'S SPONSORED TESTIMONY AND EXHIBITS

Kimberly-Clark Statement No. 1	Direct Testimony of Thomas Brooks
Exhibit TB-1	Resume of Mr. Brooks
Exhibit TB-2	Copy of Quarterly Invoice from DELCORA
Exhibit TB-3	DELCORA's 2019 Audit Report
Kimberly-Clark Statement No. 2	Direct Testimony of Eric Wentz
Exhibit EW-1	Resume of Mr. Wentz
Exhibit EW-2	Memorandum from Martha G. Protho, Director, Permits Division, to Water Management Division Directors, Regions I-X, <i>Permit Implications of Privatization</i> (April 16, 1987)
Kimberly-Clark Statement No. 1-SR	Surrebuttal Testimony of Thomas Brooks
Kimberly-Clark Statement No. 2-SR	Surrebuttal Testimony of Eric Wentz

PROPOSED FINDINGS OF FACT

1. Kimberly-Clark operates a manufacturing plant in Chester, Pennsylvania. *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 1, lines 2-3.
2. In 1910, Scott Paper Company purchased what was then an abandoned soap factory. *Id.* at page 2, line 15.
3. Kimberly-Clark acquired the plant in 1995. *Id.* at line 16.
4. The plant is 1.1 million square feet and located on a 90 acre site. *Id.* at lines 16-17.
5. There are 575 full-time employees who operate the plant 24 hours a day, 7 days a week. *Id.* at lines 17-18.
6. The plant primarily produces Scott® Brand bath tissue. *Id.* at line 18.
7. Kimberly-Clark has invested over \$350 million into infrastructure for the plant over the last ten years. *Id.* at lines 19-20.
8. Kimberly-Clark is DELCORA's largest customer in the Western Service Region and appears to be its largest customer overall.
9. According to DELCORA, Kimberly-Clark is the largest volume industrial customer in the Western Service Region. Kimberly-Clark's flow is 30% higher than the next largest western industrial customer. During the calendar year 2019, DELCORA budget documents indicate that the volume of wastewater discharged by Kimberly-Clark was approximately 1,468,438 million gallons and that Kimberly-Clark paid DELCORA \$4,077,441 for its services. Kimberly-Clark's discharge volumes and revenue are approximately 18.7% and 16.2%, respectively, of DELCORA's Western Plant total volumes and revenue. *Id.* at lines 8-15.

10. DELCORA executed a Service Agreement with Scott Paper Company dated December 1, 1973 (“Service Agreement”) under which Scott Paper and several other industrial customers funded the construction and operations of DELCORA’s Western Wastewater Treatment Plant (“Western Plant”) and a related conveyance system. *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 3, lines 6-9.

11. That conveyance system was constructed and now is used by DELCORA in order to serve several industrial customers, including the Scott Paper plant now owned by Kimberly-Clark. *Id.* at lines 9-11.

12. Under the Service Agreement, Scott Paper was obligated to pay 26% of the annual debt service charges related to the bonds issued to purchase and construct the Western Plant and 55% of the annual debt service charges for the bonds issued for the purchase and construction of the conveyance system. *Id.* at lines 12-15.

13. On December 12, 1995, Kimberly-Clark assumed all of the rights and obligations of Scott Paper under the Service Agreement as part of Kimberly-Clark’s acquisition of the plant. *Id.* at lines 15-17.

14. Kimberly-Clark has paid rates and charges to DELCORA in accordance with the Service Agreement since it assumed the Agreement. *Id.* at lines 17-19.

15. Kimberly-Clark has also continued to fund the capital and operating requirements of the Western Plant and the related conveyance system in accordance with the terms of the Service Agreement. *Id.* at lines 19-21.

16. A copy of the Service Agreement is attached to the Application as Exhibit F105.

17. DELCORA has claimed that the Service Agreement expired or was terminated in 2003 and that thereafter Kimberly-Clark agreed that the “pretreatment program’s Rules and Regulations” would determine the terms of the relationship. *Id.* at page 4, lines 2-4.

18. Kimberly-Clark was not aware of DELCORA’s claim that the Service Agreement was terminated until this proceeding and apparently both Aqua and DELCORA were unaware of any alleged termination until this proceeding as well. *See* Kimberly-Clark Statement No. 1-SR, Brooks Surrebuttal Testimony, page 1, line 23, page 2, lines 1-2.

19. The Service Agreement was attached to the Application (Exhibit F105) and to the Asset Purchase Agreement (Exhibit B1) as one of the contracts DELCORA must assign to Aqua if the transaction is approved.

20. In the Asset Purchase Agreement dated September 2019, DELCORA and Aqua clearly state that Kimberly-Clark’s Service Agreement will be assigned and assumed. *See* Application (Exhibit B1).

21. In addition, Kimberly-Clark has found no evidence in its business records to support DELCORA’s assertion that the Service Agreement expired. *Id.* at page 2, lines 7-8.

22. Kimberly-Clark has been unable to identify any fully formed successor agreement and according to Mr. Pileggi, no such written successor agreement exists. *Id.* at lines 10-12; Aqua Statement No. 6-R, Rebuttal Testimony of John Pileggi, page 11, lines 16-17.

23. The quarterly invoices Kimberly-Clark receives from DELCORA states very clearly that the charges incurred are “per agreement dated December 18, 1973.” *See* Kimberly-Clark Statement No. 1, Brooks Direct Testimony, page 4, lines 16-17; *See also* Exhibit Kimberly-Clark TB-2 (copy of quarterly invoice).

24. Mr. Pileggi admitted that DELCORA continues to calculate Kimberly-Clark's rates based on the terms in the Service Agreement and that "DELCORA's pretreatment program's Rules and Regulations do not determine billing rates for flow and loadings." *See* Aqua Statement No. 6-R, Rebuttal Testimony of John Pileggi, page 11, lines 17-19, and page 12, lines 4-6.

25. Kimberly-Clark currently relies on DELCORA to obtain any and all permits with respect to the wastewater that is transported to the Western Plant. Kimberly-Clark then receives an Industrial Wastewater Discharge Permit through DELCORA's Industrial Pretreatment Program. *See* Kimberly-Clark Statement No. 2, Wentz Direct Testimony, page 10, lines 1-2.

26. DELCORA is responsible for administering the Pretreatment Program and obtaining all necessary federal or state permits, including the National Pollutant Discharge Elimination System (NPDES) permits. *Id.* at 2-5.

27. Kimberly-Clark has expressed concern that, as a private sector firm, Aqua may no longer be eligible to administer the Industrial Pretreatment Program or obtain NPDES permits that cover the industrial wastewater processed by the Western Plant. *See, e.g., id.* at 17-19.

28. As the owner and operator of a publicly owned treatment works, DELCORA is able to administer the Industrial Pretreatment Program and obtain NPDES permits that cover the wastewater discharges of Kimberly-Clark. *Id.* at page 11, lines 17-19.

29. Aqua has provided no evidence or authority to show that, as a private entity, it will be eligible to do the same.

30. The key constituents of the wastewater from Kimberly-Clark's two outfalls are paper fibers and soil. *Id.* at page 6, lines 3-4.

31. Other chemicals in the wastewater are for water treatment or come from treated city water. *Id.* at lines 4-5.

32. The paper fibers are essentially the same fibers found in any publicly available toilet paper used by consumers. *Id.* at lines 5-7.

33. The levels of TSS and BOD are within permit limits and are less than any discharge where human excrement is a part of that discharge. *Id.* at lines 7-8.

34. DELCORA has eliminated or scaled back the amount of sampling Kimberly-Clark is required to conduct over the last few years because there have been no concerns or issues with sampling for constituents that are not present in the wastewater, including heavy metals, TSS, and BOD. *Id.* at lines 8-12.

35. This is mostly clean city water that greatly dilutes the fiber content of Kimberly-Clark's wastewater and is believed to be beneficial to the treatment process used at DELCORA's Western Plant. *Id.* at lines 12-14.

36. Kimberly-Clark's wastewater also does not contain any additional constituents that are not already found in households that flush toilet paper except, importantly, Kimberly-Clark's is free from human excrement. *Id.* at lines 4-6.

37. The volume of Kimberly-Clark's water also allows for greater dilution of other wastewater DELCORA receives that is highly concentrated. *Id.* at lines 6-8.

38. In addition to high volume, Kimberly-Clark's wastewater also has a high load factor, which means the flow of wastewater is continuous and does not exhibit large fluctuations hour-to-hour or day-to-day. *See* Kimberly-Clark Statement No. 2-SR, Wentz Surrebuttal Testimony, page 3, lines 10-12.

39. This constant flow makes Kimberly-Clark's wastewater easier and cheaper to process as compared to wastewater from customers with low load factors. *Id.* at lines 13-15.

40. The transaction would result in a 12.55% rate increase. *See* SPMT Statement No. 2, Direct Testimony of Howard Woods, page 6, lines 2-9.

41. Aqua is a private sector firm obligated to increase profits for its shareholders. According to Aqua's 2019 Annual Report, Aqua has a history of generating 10% returns.

42. The revenue requirement for DELCORA under private sector ownership would effectively double and would increase by \$15 million per year, even before any additional investment. *Id.* at page 6, lines 11-20.

43. If and when Aqua invests another \$1.1 billion, as planned, this difference grows to \$46 million per year. *Id.* at page 7, lines 4-14.

44. The asserted economies of scale are only in the range of \$3.7 million per year. *See* Delaware County Hearing Exhibit No. 1 (*Aqua's Responses to Delaware County Set X Interrogatories*).

45. DELCORA is already a large entity, and Aqua plans to continue operating the wastewater system in exactly the same way as DELCORA. *See* SPMT Statement No. 2, Direct Testimony of Howard Woods, page 15, lines 18-19.

PROPOSED CONCLUSIONS OF LAW

1. As the applicant and the party seeking affirmative relief from the Commission, Aqua bears the burden of proof in this proceeding. *See* 66 Pa. C.S. § 332(a).

2. To satisfy that burden, Aqua must demonstrate by a preponderance of the evidence that the proposed transaction complies with Pennsylvania law. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n.*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990).

3. Even where a party has established a prima facie case, the party with the burden of proof must establish that “the elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.” *Burleson v. Pa. Pub. Util. Comm’n.*, 461 A.2d 1234, 1236 (Pa. 1983).

4. The evidence must be substantial and legally credible, and cannot be mere “suspicion” or a “scintilla” of evidence. *Lansberry*, 578 A.2d at 602.

5. To obtain a certificate of public convenience, “the acquiring public utility has the burden, by preponderance of the evidence, to establish that it is technically, legally and financially fit to provide the proposed service.” *McCloskey v. Pa. Pub. Util. Comm’n.*, 195 A.3d 1055, 1058 (Pa. Commw. Ct. 2018), *citing Seaboard Tank Lines, Inc. v. Pa. Pub. Util. Comm’n.*, 502 A.2d 762 (Pa. Commw. Ct. 1985).

6. An existing certificate holder is entitled to a continuing presumption regarding its fitness. *McCloskey* 195 A.3d at 1058. Parties challenging the application bear the burden of rebutting this presumption. *Lehigh Valley Transp. Services, Inc. v. Pa. Pub. Util. Comm’n.*, 56 A.3d 49, 58 (Pa. Commw. Ct. 2012).

7. The Commission’s adjudications must be supported by substantial evidence in the record. *See* 2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 602.

8. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consol. Edison Co. of New York v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938).

9. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Commw. Ct. 1984).

10. Section 1329 provides, inter alia, that when a regulated private sector water or wastewater utility acquires a municipal water or wastewater provider, the regulated utility can ask for ratemaking treatment of the acquired utility's assets using fair market value. 66 Pa. C.S. § 1329.

11. Section 1329 did not abrogate or repeal the other applicable sections of the Code. While Section 1329 provides incentives for the acquisition of faltering public systems, it did not eliminate or alter any of the other standards or requirements for approval (e.g., Sections 1102, 1103, and 507).

12. Aqua has the burden of proving it satisfies the requirements of the Code, particularly Sections 1102 and 1103. *See* 66 Pa. C.S. §§ 1102 and 1103.

13. Section 1102(a) provides that the Commission must issue a Certificate as a legal prerequisite to allowing any entity to operate as a wastewater utility in a defined territory within the Commonwealth of Pennsylvania.

14. The Commission will only grant a Certificate “if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” *See* 66 Pa. C.S. § 1103(a).

15. To ensure that a transaction is in the public interest, the Commission may impose conditions in granting a Certificate that it deems to be just and reasonable. *Id.*

16. In order for the Commission to approve the proposed transaction under Sections 1102 and 1103 of the Code, the Applicant must demonstrate that the proposed acquisition will “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n.*, 295 A.2d 825, 828 (Pa. 1972).

17. Aqua must prove “not only that no harm will come from the transaction,” but also that “substantial affirmative benefits” will flow from it. *McCloskey*, 195 A.3d at 1064, *citing City of York*, 295 A.2d at 828.

18. In deciding whether the transaction results in a “substantial public benefit,” the Commission must address the impact of the transaction on rates. *McCloskey*, 195 A.3d at 1066 (“Because *City of York* requires the impact on rates to be considered, the Commission must address that impact when deciding whether there is substantial public benefit.”).

19. The Commission must decide whether any harmful rate impact “is outweighed by the other positive factors.” *McCloskey*, 195 A.3d at 1067.

20. Likewise, the Commission must decide whether the proposed transaction will create environmental permitting risks for ratepayers; any significant risk to ratepayers bears directly on whether the transaction is in the public interest.

21. In this proceeding, Aqua has not carried its burden to prove that no harm will result from the transaction.

22. Aqua has not carried its burden to adduce evidence sufficient to allow the Commission “to find affirmatively that public benefit will result from the merger.” *City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825, 828 (Pa. 1972) (*City of York*). See *Popowsky v. Pennsylvania Public Utility Commission*, 937 A.2d 1040 (Pa. 2007) (Verizon’s application for a certificate of public convenience permitting Verizon’s acquisition of MCI as a wholly-owned subsidiary measured against the “substantial affirmative public benefits” standard).

23. Aqua has not presented sufficient evidence demonstrating that the negative rate impact resulting from the transaction “is outweighed by the other positive factors.” *McCloskey*, 195 A.3d at 1067.

24. If, despite the evidence relating to harmful rate impacts, the Commission elects to approve the transaction, the Commission has broad authority to impose just and reasonable conditions mitigating the anticipated or potential harm. See 66 Pa. C.S. § 1103. Such authority should be exercised here.

25. Similarly, if the Commission approves the transaction despite the evidence relating to environmental permitting risks, the Commission has broad authority to impose just and reasonable conditions mitigating the anticipated or potential harm. See 66 Pa. C.S. § 1103. Such authority should be exercised here.

PROPOSED ORDERING PARAGRAPHS

ALTERNATIVE A

1. For the reasons set forth above, Aqua Pennsylvania Wastewater, Inc.'s ("Aqua's") Application for (a) approval to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority ("DELCORA"), (b) approval of the ratemaking rate base of these assets, as Sections 1102 and 1329 of the Public Utility Code require, and (c) approval of contracts, including assignments of contracts from DELCORA to Aqua, pursuant to Section 507 of the Public Utility Code ("Application"), is hereby **DENIED**.

ALTERNATIVE B

1. For the reasons set forth above, Aqua Pennsylvania Wastewater, Inc.'s ("Aqua's") Application for (a) approval to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority ("DELCORA"), (b) approval of the ratemaking rate base of these assets, as Sections 1102 and 1329 of the Public Utility Code require, and (c) approval of contracts, including assignments of contracts from DELCORA to Aqua, pursuant to Section 507 of the Public Utility Code (Application), **is hereby GRANTED, subject to the following conditions:**

a. Aqua must establish a Tariff Rider for the purpose of allowing contract rates for industrial customers that have competitive alternatives;

b. With respect to its service to Kimberly-Clark Corporation and Kimberly-Clark Pennsylvania, LLC ("Kimberly-Clark"), Aqua must provide any benefits associated with the Customer Trust Fund for as long as that Fund survives and must follow the ratemaking principles in Kimberly-Clark's 1973 Service Agreement at least until Aqua's first rate case is completed;

c. The proposed transaction shall not be consummated until the environmental permitting issues are resolved on a basis that is satisfactory to Aqua and to Kimberly-Clark and any other impacted ratepayers;

d. Going forward, Aqua must maintain a separate DELCORA rate zone;

e. Aqua must complete cost of service studies prior to its first rate case. These studies must evaluate and calculate Aqua's costs for the DELCORA zone and must separate out the Eastern and Western Regions. These studies must also evaluate whether, or to what extent, wastewater characteristics and peak to average flow ratios may affect Aqua's costs in serving particular industrial customers. These cost of service studies must be made publicly available at least sixty (60) days prior to the initiation of any rate case by Aqua.